

MUSCOGEE (CREEK) NATION,	:	Order Referring Appeal to the
Appellant	:	Assistant Secretary - Indian
	:	Affairs
v.	:	
	:	
MUSKOGEE AREA DIRECTOR,	:	Docket No. IBIA 93-48-A
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	May 4, 1993

Appellant Muskogee (Creek) Nation seeks review of a December 31, 1992, decision issued by the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to recognize appellant's former treaty area as a reservation. For the reasons discussed below, the Board of Indian Appeals (Board) finds that this appeal should be referred to the Assistant Secretary - Indian Affairs.

On October 31, 1992, appellant's National Council adopted Ordinance NCA 92-62 (ordinance). After quoting from the district court and appellate court decisions in Indian Country, U.S.A., Inc. v. State of Oklahoma, 13 Indian L. Rep. 3076 (N.D.Okla. Apr. 24, 1986), aff'd in part, rev'd in part, 829 F.2d 967 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988), the ordinance requests:

A. That the Bureau of Indian Affairs remove [appellant] from the Category of "non-reservation tribe", and place [it] in the category of "reservation tribe", with publication of Notice in the Federal Register.

B. That the funding for the Okmulgee Agency be increased to reflect the change in recognition of [appellant's] legal status.

C. That the funding for Muskogee Area Office and other BIA programs which serve [appellant] be increased to reflect the change in recognition of [appellant's] legal status.

D. That all future allocation of BIA funds reflect the change in recognition of [appellant's] legal status.

E. That authority be delegated to the Superintendent, Okmulgee Agency, to verify this change in recognition of [appellant's] legal status to any Federal, state or local agency of government, upon the written request of the Principal Chief or Resolution of the National Council.

The ordinance was forwarded to the Area Director, who, by letter dated December 24, 1992, responded:

The ordinance requests several actions on the part of [BIA] revolving around the recognition of [appellant] as a reservation tribe.

We interpret the ordinance as requesting the former Creek treaty area, as established by the Treaty of June 14, 1866, be recognized as a reservation, and that funding be increased to the same level as that for "reservation tribes." We have never considered the former treaty areas of the Five Civilized Tribes of Oklahoma as reservations and, to the best of our knowledge, there are no separate [BIA] funding categories for "reservation" and "non-reservation" tribes.

[Appellant] currently enjoys the same legal status as other federally-recognized Indian tribes. If the purpose of the ordinance is to increase the funding received by [appellant] in the belief that a reservation designation will achieve this, we believe there are other avenues through which to accomplish this. On the other hand, if the intent is to expand the civil and criminal jurisdiction currently exercised by [appellant] in addition to increased funding, there are greater implications involved. I do not feel as Area Director, Muskogee Area Office, that I possess the authority to grant reservation status or recognize such status.

A meeting was held on December 29, 1992, among representatives of appellant, the Muskogee Area Office, and the Tulsa Field Solicitor's Office. Because the Area Director's position remained unchanged after that meeting, appellant requested the issuance of an appealable decision. By letter dated December 31, 1992, the Area Director formally declined to take the actions requested in the ordinance:

I [do] not believe that authority to grant or even recognize reservation status for [appellant] exists at this level. Rather, this authority lies with the Secretary, if at all, and quite possibly only with Congress. Therefore, it is my position that I cannot act on the ordinance and am declining to do so.

On January 5, 1993, appellant requested that the Area Director "advance [appellant's] request for affirmation of reservation status to the appropriate level of hierarchy within the [BIA], from which an authoritative decision can be made concerning the subject request." By memorandum dated January 11, 1993, the Area Director referred the matter to the Director, Office of Trust and Economic Development (now, Office of Trust Responsibilities), in BIA's Washington, D.C., Central Office. Appellant's filings indicate that it was not advised of this action.

The Board received appellant's notice of appeal on February 10, 1993. Because the nature of and reasons for appellant's request for recognition of reservation status were unclear from the materials filed with the notice of appeal, by order dated February 10, 1993, the Board requested position statements from both parties:

In order to expedite consideration of this appeal, and, if necessary, to allow timely referral of this matter to the appropriate Departmental official, appellant is requested to provide the Board with a copy of Ordinance NC 92-62, a citation to [Indian Country, U.S.A., Inc., supra] , and a statement of the purpose for which it seeks recognition of reservation status. The Area Director is requested to provide the Board with a statement of his position as to why he believes he lacks authority to recognize reservation status for the purpose sought by appellant.

Both position statements have been received and carefully reviewed.

Appellant contends that a reservation was established for it by the Treaty of February 14, 1833, 7 Stat. 417, and was diminished by the Treaty of June 14, 1866, 14 Stat. 785. It further argues that the reservation boundaries have not been extinguished by Congress, and the reservation status was recognized in the Indian Country, U.S.A. cases. Appellant contends that its reservation has been recognized in BIA regulations in 25 CFR 11.1(a)(23), dealing with law and order on Indian reservations.

The Area Director states that appellant's former treaty areas are not now, and have not historically been, regarded as a "reservation" by either BIA or Congress. He argues that references to a reservation in the Indian Country, U.S.A. decisions were dicta. Contending that present BIA policies in 230 DM 3.1 and 3.2 and 25 CFR Part 151 do not address the authority of BIA officials to proclaim Indian reservations under the circumstances of this case, the Area Director continues to decline to issue a decision on a subject where his authority is not clear.

The Board agrees with the Area Director that his authority to grant or deny the relief appellant requests is unclear. Furthermore, to the extent appellant seeks increased funding from BIA appropriations, the Board lacks jurisdiction over this appeal. For these reasons, the Board concludes that this matter should be referred to the Assistant Secretary - Indian Affairs.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is referred to the Assistant Secretary - Indian Affairs.

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge